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Supreme Court of the United States

October Term, 1994

Roy Romer, as Governor of the State of Colorado, and the State of Colorado,

Petitioners,

v.

Richard G. Evans, Angela Romero, Linda Fowler, Paul Brown, Priscilla Sheppe, John Miller, the Boulder Valley School District Re-2, the City and County of Denver, the City of Boulder, the City of Aspen, and the City Council of Aspen,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF OF NATIONAL EDUCATION ASSOCIATION, THE COLORADO EDUCATION ASSOCIATION, THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, THE COUNCIL OF THE GREAT CITY SCHOOLS, AND THE NATIONAL ASSOCIATION FOR CHICANA AND CHICANO STUDIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Robert H. Chanin
(Counsel of Record)
John M. West
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-2240

Counsel for Amici Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-1039

ROY ROMER, as Governor of the State of Colorado, and the STATE OF COLORADO,

Petitioners,

v.

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, PRISCILLA INKPEN, JOHN MILLER, the BOULDER VALLEY SCHOOL DISTRICT RE-2, the CITY AND COUNTY OF DENVER, the CITY OF BOULDER, the CITY OF ASPEN, and the CITY COUNCIL OF ASPEN,

Respondents.

On Writ of Certiorari to the Supreme Court of the State of Colorado

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BRIEF OF NATIONAL EDUCATION ASSOCIATION, THE COLORADO EDUCATION ASSOCIATION, THE AMERICAN FEDERATION OF TEACHERS, AFL-CIO, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, THE ASSOCIATION FOR SUPERVISION AND CURRICULUM DEVELOPMENT, THE COUNCIL OF THE GREAT CITY SCHOOLS, AND THE NATIONAL ASSOCIATION FOR CHICANA AND CHICANO STUDIES AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

This brief *amici curiae* is filed, with the written consent of the parties, in support of respondents Richard G.

Evans *et al.* by a coalition of organizations concerned with the quality of public education. *Amici* include the National Education Association, the Colorado Education Association, the American Federation of Teachers, AFL-CIO, the American Association of University Professors, the Association for Supervision and Curriculum Development, the Council of the Great City Schools, and the National Association for Chicana and Chicano Studies.

INTEREST OF AMICI CURIAE

The National Education Association ("NEA") is a nationwide employee organization with a current membership of some 2.2 million teachers and other education employees, the vast majority of whom are employed by public school districts, colleges, and universities. NEA operates through a network of affiliated organizations: it has as state affiliates an organization in each of the 50 states, and has approximately 12,000 local affiliates in individual school districts, colleges, and universities throughout the United States. As set forth in the preamble to its Constitution, the objectives of NEA are, *inter alia*, to "advance the cause of education for all individuals, promote the health and welfare of children and/or students . . . [and] promote and protect human and civil rights." The Colorado Education Association ("CEA") is NEA's state affiliate in Colorado, and it pursues similar objectives within the state of Colorado.

The American Federation of Teachers, AFL-CIO ("AFT") is a national labor union affiliated with the AFL-CIO, and is the parent organization of various state affiliates. AFT represents over 875,000 members who work in public elementary and secondary schools, community colleges and universities, state government, and health care. The vast majority of AFT members work as teachers and teaching assistants in public elementary and secondary schools.

The American Association of University Professors ("AAUP") is a national membership organization of

more than 43,000 faculty members and research scholars in all the academic disciplines. Among other activities, AAUP formulates recommended policies for American higher education. Since 1976, AAUP has condemned discrimination in the academic community on the basis of sexual orientation. The organization seeks adoption of similar policies by colleges and universities. Complementing its policy work, AAUP participates as *amicus curiae* in litigation, and has participated in several cases involving gay and lesbian rights. AAUP is deeply concerned about the pervasive national problem of discrimination on the basis of sexual orientation, and believes this problem must be remedied at all levels of education.

The Association for Supervision and Curriculum Development ("ASCD") is an international nonpartisan association of over 198,000 educators who share the belief that all students can succeed in a challenging, well-planned educational program. ASCD is committed to its mission of forging covenants in teaching and learning for the success of all learners. ASCD condemns discrimination in any form and has adopted a resolution urging its members to work with other organizations to eliminate discrimination against students because of their sexual orientation.

The Council of the Great City Schools ("CGCS") is a coalition of some 50 of the nation's largest urban public school systems. Its members' inner-city schools serve about six million children (13.5 percent of the nation's total elementary and secondary school enrollment), 75 percent of them African American, Hispanic, and Asian American. Approximately 40 percent of the nation's poor children, 35 percent if its limited English proficient children, and 12 percent of its disabled children are enrolled in CGCS schools. One of the central missions of these schools is to create educational opportunities for youth whose background or status would otherwise doom them to a second-class future. That includes students no matter their gender or sexual orientation. A substantial part

of making those individual futures brighter involves instilling tolerance, respect, and acceptance. CGCS believes that this case is important to the nation's urban schools in ensuring that they remain free to develop prudent, age-sensitive education for all students, and in permitting each city to retain decision-making authority to match local wishes and values.

The National Association for Chicana and Chicano Studies ("NACCS"), with a membership of approximately 2,000, is the oldest and largest organization bringing together Chicana and Chicano academics, students, and community members from across the nation and across disciplinary lines. NACCS confronts and challenges structures of inequality based on race, class, gender, and sexuality. As an organization historically concerned with the quality of life of all Chicanas and Chicanos, NACCS asserts that discrimination against any members of the community is discrimination against all. As an academic community with firsthand experience of discrimination and prejudice in society and throughout education, NACCS strongly believes that academic development and freedom depend on a climate of mutual respect and acceptance of diversity.

Because *amici* are opposed to discrimination on the basis of sexual orientation, because *amici* believe that public school districts must be able to prohibit such discrimination and otherwise provide for the needs of gay and lesbian students if they are to fulfill their educational mission, and because *amici* share an institutional commitment to the educational mission of the public schools, *amici* have a substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

At issue in this case is the constitutionality of a proposed amendment to Article II of the Colorado Constitution that was approved by the electorate on November 3, 1992. This proposed amendment—known as "Amendment 2"—provides as follows:

> NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Although *amici* are of the opinion that Amendment 2 violates the Fourteenth Amendment to the United States Constitution, it is not the purpose of this brief to present the relevant constitutional arguments. *Amici* defer in this regard to respondents. As organizations concerned with the quality of public education, *amici* file this brief in order to provide this Court with a perspective on the impact of Amendment 2 that it might not otherwise receive. Specifically, we shall demonstrate why Amendment 2 significantly would impair the ability of the public schools to fulfill their educational mission.[1]

No precise figures are available as to the number of gay and lesbian[2] students in the public schools. Based upon what is known about the incidence of homosexual-

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[1] As used in this brief, the term "public schools" refers to elementary and secondary schools. This is not to suggest, however, that the analysis necessarily is limited to this universe. With appropriate adjustments for the maturity level of the individuals involved, much of the analysis would apply as well to students in public colleges and universities.

[2] Amendment 2 refers to persons of "homosexual, lesbian or bisexual orientation." For purposes of simplicity in discussion, and to be consistent with the terminology used in much of the source material cited, we shall in this brief refer to the persons encompassed by Amendment 2 as "gay and lesbian."

ity in the general population,[3] however, it can be assumed that there are students in almost every classroom in the country who are gay or lesbian.

In Part I of our Argument, we explain why the public schools must display particular concern for this segment of the student population. While sexual orientation is generally established early in life, it is during adolescence that most gay and lesbian youngsters—like their heterosexual counterparts—become aware of their sexual orientation. Gay and lesbian adolescents develop this awareness in a societal context in which homosexuals are widely rejected on the basis of invidious stereotypes which the adolescent likely already has internalized. Unlike members of other minority groups, moreover, gay and lesbian adolescents do not have access to support groups; it generally is in isolation and ignorance that they wrestle with the discovery of their new-found status as members of a group despised by much of society.

Typically, the gay or lesbian adolescent attempts initially to deal with his or her sexual identity by hiding it, and leading a life based on deception and fear of discovery. Should the adolescent's sexual orientation be disclosed, voluntarily or involuntarily, he or she risks rejection and persecution, both at home and at school. Because of societal discrimination and internalized homophobia, many gay and lesbian adolescents suffer from low self-esteem, self-hatred, and isolation—of which one result is an extraordinarily high level of attempted suicide

[3] Estimates of the homosexual portion of the general population range between a high of 10 percent and a low of 4 percent for men and 1.5 percent for women. *See* Bailey & Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Arch. Gen. Psychiatry 1089, 1093 (1991); Bailey, Pillard, Neale & Agyei, *Heritable Factors Influence Sexual Orientation in Women*, 50 Arch. Gen. Psychiatry 217, 220 (1993). It is neither possible, nor for present purposes necessary, to resolve these differences. Under any reasonable estimate, it is clear that the number of gays and lesbians in the general population is significant.

among these young people. The public schools fail in their educational mission if they do not create a secure learning environment for gay and lesbian students, and develop programs to address the needs of these students.

In Part II of our Argument, we demonstrate why Amendment 2 undermines the ability of the public schools to meet the needs of gay and lesbian students, and, indeed, to fulfill the schools' broader obligation properly to educate all students, including those who are not themselves gay or lesbian. Amendment 2 would prohibit school districts from adopting the type of antidiscrimination policies that are essential for the creation of a secure learning environment for gay and lesbian students, and it would deter school districts from providing training for their employees and instituting other programs designed to meet the needs of these at-risk students. Further, the threat to job security that may result from voluntary or involuntary disclosure that a teacher or other staff member is gay or lesbian will discourage such employees from serving as much-needed counselors and role models for their gay and lesbian students. Finally, and in some ways most tragically, by granting constitutional sanction to invidious discrimination against the members of one minority group, Amendment 2 undermines the ability of the public schools to teach all of their students the lessons of tolerance and respect for those who are different.

ARGUMENT

I. THE PUBLIC SCHOOLS MUST, AS PART OF THEIR EDUCATIONAL MISSION, ADDRESS THE NEEDS OF GAY AND LESBIAN STUDENTS

A. It is not known with certainty why some people develop a homosexual and others a heterosexual orientation. While there probably is no single factor that determines a person's sexual orientation, there is little doubt that genetics plays a major role. Recent studies of identical twins suggest that the influence of genetic factors in determining sexual orientation is somewhere between 30 and 75 percent, in both men and women. Bailey & Pillard, *A Genetic Study of Male Sexual Orientation*, 48 Arch. Gen. Psychiatry 1089 (1991); Bailey, Pillard, Neale & Agyei, *Heritable Factors Influence Sexual Orientation in Women*, 50 Arch. Gen. Psychiatry 217 (1993); *see also* Bailey & Benishay, *Familial Aggregation of Female Sexual Orientation*, 150 Am. J. Psychiatry 272 (1993). *See generally* Burr, *Homosexuality and Biology*, Atlantic Monthly, March 1993, at 47. In addition, there is evidence that sexual orientation derives to some degree from other biological factors, such as prenatal sex hormone levels. Green, *The Immutability of (Homo)sexual Orientation: Behavioral Science Implications for a Constitutional (Legal) Analysis*, 16 J. Psychiatry & Law 537, 549 (1988).

Whatever influence environmental factors have on a person's sexual orientation, it is believed that this influence is felt early in the life of a child, and that sexual orientation becomes fixed before puberty, quite possibly by the age of five or six. Burr, *supra*, at 64; Sturdevant & Remafedi, *Special Health Needs of Homosexual Youth*, 3 Adolescent Medicine 359, 360 (1992); Hunter & Schaecher, *Stresses on Lesbian and Gay Adolescents in Schools*, 9 Social Work in Education 180, 181 (1987); Dennis & Harlow, *Gay Youth and the Right to Education*, 4 Yale L. & Policy Rev. 446, 465 (1986); Green, *supra*,

at 567-68. Many gays and lesbians recall being "different" from their peers during childhood, *e.g.*, by displaying atypical gender roles. M. Saghir & E. Robins, *Male and Female Homosexuality: A Comprehensive Investigation* 18-21, 192-94 (1973); A. Bell, M. Weinberg & S. Hammersmith, *Sexual Preference* 188-89 (1981). In most cases, gays and lesbians develop an awareness of their attraction to the same sex during early adolescence, often by the age of fourteen. Anderson, *Family and Peer Relations of Gay Adolescents, in* 14 *Adolescent Psychiatry: Development and Clinical Studies* 162, 165 (S. Feinstein ed. 1987); Remafedi, *Male Homosexuality: The Adolescent's Perspective*, 79 Pediatrics 326, 330 (1987); D'Augelli & Dark, *Lesbian, Gay, and Bisexual Youths, in Reason to Hope: A Psychosocial Perspective on Violence and Youth* 177, 180 (L. Eron, J. Gentry & P. Schlegel eds. 1995).

It is clear, therefore, that numerous public school students will be struggling during their junior and senior high school years to cope with the realization of their homosexual identity. And they will be doing so in the face of a society that is almost uniformly hostile to gays and lesbians. These students are at high risk for serious psychosocial problems—not because they are gay or lesbian, but because of the prejudice and rejection they encounter around them.

B. Long before the time that gay and lesbian youth become aware of their sexual orientation, most have internalized the invidious stereotypes which accompany the pervasive condemnatory attitudes that one of petitioners' *amici* describes as society's "expression of [its] consensus on matters of homosexuality." [4] Thus,

> [e]ven before they reach the kindergarten playground, they learn nasty words for homosexuals. The few

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[4] Brief Amicus Curiae of the Family Research Council in Support of Petitioners at 2 and *passim*.

> lesbian or gay people they have seen in movies and on television often die by suicide, homicide, or AIDS, creating disastrous expectations. Moreover, young people generally assume that all the people they know are heterosexual; they have no idea that some of the healthy, respected adults around them are lesbian or gay.

Cook, *Who is Killing Whom?* 1 (Respect All Youth Project of Fed'n of Parents & Friends of Lesbians & Gays, Issue Paper 1, 1991). Then, "[i]n adolescence, young homosexually oriented persons are faced with the growing awareness that they may be among the most despised." Martin, *Learning to Hide: The Socialization of the Gay Adolescent, in* 10 *Adolescent Psychiatry: Developmental and Clinical Studies* 52, 57 (S. Feinstein *et al.* eds. 1982).

The problem is particularly acute because gay and lesbian youth usually discover their sexual orientation in complete isolation; at the time of their greatest anxiety they typically have no access to support groups, and often are unaware that there are many others among their peers who are undergoing the same experience. Gay and lesbian youth differ in this regard from members of most other stigmatized minority groups:

> Most individuals within other stigmatized groups, such as African Americans, grow up in families whose members have personally experienced discrimination. Such families have developed ways to support each other and to teach children—virtually from infancy—how to cope. Lesbian and gay youth, on the other hand, usually have no such family and community backup; indeed, their families often mirror the larger society's hostility.

Cook, *supra*, at 2. While "Blacks, Jews, and Hispanics are not thrown out of their families or religions at adolescence for being black, Jewish, or Hispanic[,] homosexual adolescents are." Hetrick & Martin, *Developmental Issues and Their Resolution for Gay and Lesbian Adolescents*, 14 J. Homosexuality 25, 29 (1987).

In addition, gay and lesbian youth lack access to accurate information about homosexuality, and thus "often demonstrate an appalling ignorance of what it means to be homosexual, reflecting the basest stereotypes about homosexual people and therefore about themselvs." *Id.* at 32. This lack of accurate information about homosexuality is exacerbated by the absence of appropriate role models. Because of the societal stigma associated with homosexuality,

> [h]omosexually oriented teachers, clergymen, and physicians must hide their sexual identity. Aside from the effect on the professionals involved, this discrimination effectively denies suitable role models who can demonstrate to the gay adolescent by example, sharing, and teaching that the prejudices of society are false and that homosexuality does not automatically mean depravity, criminality, and degeneracy. Heterosexual adolescents have a multitude of role models for all possible social identities which may touch on their sexual orientation, but homosexual adolescents have no constructive models and indeed are led to believe that their sexual identity precludes other roles.

Martin, *supra*, at 55.[5]

The result is often an "internalized homophobia," Gonsiorek, *Mental Health Issues of Gay and Lesbian Adolescents*, 9 J. Adolescent Health Care 114, 117-19 (1988), which brings with it a sense of social isolation and moral worthlessness, ranging from a tendency toward self-doubt to overt self-hatred:

> Homosexual teenagers, like heterosexual teenagers, are raised with antihomosexual biases. Among homo-

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[5] Gay and lesbian adults often hesitate to counsel and serve as role models for gay adolescents to avoid the accusation that they are "encouraging" homosexuality or "recruiting" adolescents to be homosexual. Taylor, *Gay and Lesbian Youth: Challenging the Policy of Denial, in Helping Gay and Lesbian Youth* 39, 46 (T. DeCrescenzo ed. 1994). *See infra* note 14.

> sexual adolescents, the effects of homophobia are complex. To some degree, homophobic attitudes are internalized and thereby contribute to negative self-image. Internalized homophobia has a variety of manifestations, including overtly self-destructive and abusive behaviors. More subtle symptoms include abandonment of educational goals and poorly planned disclosure of sexual orientation to others. Homosexual youth often need help to recognize and modify internalized homophobia before self-destructive behaviors cause irreparable harm.

Sturdevant & Remafedi, *supra*, at 363.[6] Not surprisingly, "[m]ost gay adolescents can vividly recall the intense anxiety they experienced when they first discovered that they suddenly belonged to this group of people that is so vehemently despised by most others. The industriousness they mastered in childhood, the positive self-regard they may have developed, and the dreams for a happy and productive future seem to be dashed almost as soon as they enter the awareness of the gay adolescent." Anderson, *supra*, at 173.

Because this homosexual identity is likely to have serious consequences for their family relationships, most gay and lesbian adolescents initially attempt to conceal their sexual orientation:

> Realizing that if one's parents knew the truth, they would find one utterly contemptible, is frightening to the adolescent. It is not surprising that most of these adolescents feared that they would be rejected, punished, perhaps physically assaulted, or expelled from

[6] One consequence of this internalized homophobia—and the lack of positive gay or lesbian role models—is that "[a]dolescents who accept the negative images attached to a homosexual identity are at risk for incorporating them within their own repertoire of behaviors. For example, they may assume the affectations or the promiscuous lifestyles that they believe are socially expected." Remafedi & Blum, *Working with Gay and Lesbian Adolescents*, 15 Pediatric Annals 773, 779 (1986).

> the family. The gay adolescent consciously and unconsciously defends against these fears by a variety of maneuvers that have in common an effect of distancing the child from the family.

Id. at 165. The same is true, perhaps to an even greater extent, in the adolescent's relationships with his or her peer group. "Withholding important personal information and suppression of his or her genuine interests results in the elaboration of a false persona in order to gain peer acceptance or to maintain status." Anderson, *Lesbian and Gay Adolescents: Social and Developmental Considerations, in The Gay Teen* 17, 24 (G. Unks ed. 1995).

This strategy of concealment "exacts a high cost in vigilance, self-loathing, and the elaboration of defenses to contain the chronic anxiety which this situation produces." *Id.* Such a strategy

> distorts almost all relationships the adolescent may attempt to develop or maintain and creates an increasing sense of isolation. The adolescent realizes that his or her membership in the approved group, whether it be the team, the church, the classroom, or the family, is based on a lie. This reinforces the belief that one is not truly a member of the group, even while membership within it is maintained.

Martin, *supra*, at 58-59.[7]

[7] Typical of the gay or lesbian adolescent's position is the following comment by a teenager who testified before the Massachusetts Governor's Commission on Gay and Lesbian Youth:

> I felt completely isolated from my family and friends. It appeared that I was the only one who ever had these queer feelings. I couldn't come out to anyone. After all, who would associate with anyone who was sick and deranged as I throught myself to be if they knew the truth. Not only does society shout at me that I am evil, but an inner voice whispers it as well.

Making Schools Safe for Gay and Lesbian Youth 14 (Massachusetts Governor's Commission on Gay and Lesbian Youth 1993).

If, on the other hand, gay and lesbian youth are open about their sexual orientation, "they may feel some sense of security within themselves but face tremendous external conflicts with family and peers." Gibson, *Gay Male and Lesbian Youth Suicide*, Report of the Secretary's Task Force on Youth Suicide 3-110, 3-112 (U.S. Dep't of Health & Human Services 1989). *See generally* Borhek, *Helping Gay and Lesbian Adolescents and Their Families*, 9 J. Adolescent Health Care 123 (1988). The inability of the adolescent's parents to reconcile their child's homosexual identity with their own attitudes and values frequently results in the child whose sexual orientation is (voluntarily or involuntarily) disclosed being forced to leave home.[8] One study of gay adolescents found that nearly half of the subjects had left their home at least once. Remafedi, *Adolescent Homosexuality: Psychosocial and Medical Implications*, 79 Pediatrics 331, 332 (1987). Most often, those who leave home do not do so of their own volition. They are rather "pushaways" or "throwaways," Gibson, *supra*, at 3-112, many of whom end up on the streets, frequently turning to prostitution and drugs.[9]

Nor are gay and lesbian adolescents likely to find a more understanding environment with their peers:

> Adolescents can be notoriously intolerant of personal differences, and openly homosexual teenagers confront every day the social stigma attached to their homosexuality. They may be the victims of taunts, insults, cruel jokes, and physical abuse, often without protection or role-modeling by responsible adults. If a young lesbian has no familiarity with successful lesbians nor any concept of a healthy lesbian lifestyle, then the social construct of abnormality or psychopathology will be her prevailing internal image.

Sturdevant & Remafedi, *supra*, at 361.

[8] In counseling gay and lesbian adolescents, Hetrick and Martin "strongly recommend to clients who are still in high school that they think very carefully before coming out to their parents. We have seen several instances where a young person, confident of the love of his or her parents, reveals his or her homosexuality and then ends up on the street." Hetrick & Martin, *supra*, at 35.

[9] By one estimate, as many as 25 percent of all young people living on the streets are gay, lesbian, bisexual, or transsexual. *Gibson, supra*, at 3-114.

As a result, gay and lesbian adolescents frequently experience low self-esteem, identity conflicts, social isolation, academic inhibition, truancy, substance abuse, depression, suicidal ideation, and alienation from family and peer groups. Anderson, *Family and Peer Relations, supra*, at 176. These psychosocial problems may be transient, *id.*, but that is not always the case: sometimes they are fatal. According to the Secretary of Health and Human Services' Task Force on Youth Suicide, suicide is the leading cause of death among gay and lesbian youth. Gibson, *supra*, at 3-110. Nor is that suprising, inasmuch as "self-hatred, low self-esteem, and intense feelings of aloneness are typical of the profile of a suicidal person." *Making Schools Safe for Gay and Lesbian Youth* 14 (Massachusetts Governor's Commission on Gay and Lesbian Youth 1993) (citing J. Maltsberger, *Suicide Risk: The Formulation of Clinical Judgment* (1986)). Indeed, gay and lesbian youth are two to three times more likely to attempt suicide than other young people, and actual suicides by this group constitute up to 30 percent of all youth suicides. Gibson, *supra*, at 3-110. One study of young gays found that 55 percent of the sample reported a history of suicidal ideation, while 20 percent actually had attempted suicide. Schneider, Farberow & Kruks, *Suicidal Behavior in Adolescent and Young Adult Gay Men*, 19 Suicide and Life-Threatening Behavior 381 (1989). It is particularly instructive that one-third of the gay and lesbian youth who attempt suicide make their first attempt in the same year in which they come to identify themselves as homosexual. Remafedi, Farrow & Deisher, *Risk Factors for Attempted Suicide in Gay and Bisexual Youth*, 87 Pediatrics 869,

873 (1991). *See generally Death by Denial: Studies of Suicide in Gay and Lesbian Teenagers* (G. Remafedi ed. 1994).[10]

C. Rather than helping gay and lesbian students to deal with their sexual identity, the public schools often are a large part of the problem such students face. As one commentator puts it, "[n]owhere are the[] harshly negative attitudes towards homosexuality more pronounced than in junior high and high school. These institutions are the brutal training grounds where traditional social roles are rigidly reinforced." Gibson, *supra*, at 3-117. Thus, "[h]igh school, a difficult time for most people, is often a nightmare for lesbian and gay youth." Abinati, *Legal Challenges Facing Lesbian and Gay Youth, in Helping Gay and Lesbian Youth* 149, 156 (T. DeCrescenzo ed. 1994).

For many gay and lesbian students, school means "ridicule from teachers, violent harassment from fellow students, and refusals from administrators to punish verbal and physical attacks upon them." Dennis & Harlow, *supra*, at 446. Forty-five percent of gays and nearly 20 percent of lesbians report having experienced verbal abuse or physical assault in secondary schools. Gibson, *supra*, at 3-112; *see also* Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview, in Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19, 34 (G. Herek & K. Berrill eds. 1992); Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. Interpersonal Violence 295 (1990); Pilkington & D'Augelli, *Victimization of Lesbian, Gay, and Bisexual Youth in Community Settings*, 23 Am. J. Community Psychology 33

[10] A common thread in many of the accounts of suicidal ideation or suicide attempts by gay and lesbian adolescents is, as one person put it, that "I could not envision a life in which I could be happy and whole." Parlin, *We Don't Have a Problem Here, in One Teacher in 10: Gay and Lesbian Educators Tell Their Stories* 219, 221 (K. Jennings ed. 1994).

(1995).[11] "The shame of ridicule and fear of attack makes school a fearful place to go resulting in frequent absences and sometimes academic failure." Gibson, *supra*, at 3-112 to 3-113. One researcher reports that 28 percent of the gay students he studied dropped out of school. *Id.* at 3-113. For those who remain, the discriminatory atmosphere in many schools "forces gay students to concentrate on survival rather than education and destroys gay teenagers' self-esteem during a crucial developmental period." Dennis & Harlow, *supra*, at 448.[12]

[11] This often is the case even at the higher-education level. Research on several college and university campuses indicates that gay and lesbian students are four times as likely to experience physical attacks—being chased or followed, having objects thrown at them, being spit at or physically assaulted, or being the targets of vandalism or arson—as are members of the general student population. D'Augelli & Dark, *supra*, at 185 (citing G. Comstock, *Violence Against Lesbians and Gay Men* (1991)); *see generally* D'Augelli, *Lesbian and Gay Male Undergraduates' Experiences of Harassment and Fear on Campus*, 7 J. Interpersonal Violence 383 (1992); Obear, *Homophobia, in Beyond Tolerance: Gays, Lesbians and Bisexuals on Campus* 46 (N. Evans & V. Wall eds. 1991).

[12] The high school experiences of numerous lesbians and gays demonstrate powerfully the difference that a secure learning environment can make. One gay educator remembers his own high school years in the following terms:

> I was taunted daily in the hallways, in the locker room, in classes before the teacher called the roll, even during class. Whenever I volunteered to answer a question or write on the board, a slightly audible murmur from my classmates would arise. "Faggot," I would hear. I learned not to volunteer or raise my hand.
>
> In Mr. Korn's class, it was different. While most teachers looked the other way in the face of this verbal onslaught, Mr. Korn made his class an oasis of safety. No one dared harass me there, perhaps because they feared Mr. Korn himself would take offense at the epithet. I was protected there, and Mr. Korn encouraged my participation. I found myself excelling in math, a feat never duplicated before or since in

The tragic consequences that can result from the public schools' failure to address the needs of gay and lesbian students are vividly illustrated by the following anecdote from the report of the Secretary's Task Force on Youth Suicide:

> In Lebanon, Pennsylvania in 1977, a 16-year old boy fatally shot himself before entering the 10th grade. He left a suicide note explaining he could not return to school and sustain the abuse and ridicule about being gay from his classmates. A few friends at school supported (him) though they knew he was gay, but the majority ridiculed him without mercy. He skipped classes to avoid the torture and welcomed the summer vacation as a respite. But he was already taking pills to escape the reality of the approach of another school term, when he would have to move from junior high to the even more sharply defined roles of senior high. On September 3 he shared that anxiety with a friend and on September 5 he shot and killed himself.

Gibson, *supra*, at 3-128.

There is no need to belabor the point. It is clear that the public schools must display particular concern for gay and lesbian students. To meet this obligation, the schools must, at the very least, provide an environment in which these at-risk students can feel sufficiently secure so that they can devote their energies to learning rather than to survival. The schools must, in addition, teach other students who are not themselves gay or lesbian the broader lesson of tolerance: that regardless of race, sex, religion, ethnic origin, disability, or any other distinguishing characteristic—such as sexual orientation—all people should be judged according to their individual merit rather than on the basis of invidious stereotypes. In Part II below,

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> my academic career . . . . I excelled because I mattered, and was valued, and was safe, all conditions created by Mr. Korn.

Jennings, *I Remember, in One Teacher in 10: Gay and Lesbian Educators Tell Their Stories* 19, 20-21 (K. Jennings ed. 1994).

we explain why Amendment 2 undermines the ability of the public schools to perform both of these functions.

II. AMENDMENT 2 UNDERMINES THE ABILITY OF THE PUBLIC SCHOOLS TO MEET THE NEEDS OF GAY AND LESBIAN STUDENTS AND TO TEACH ALL STUDENTS THE BROADER LESSON OF TOLERANCE

A. In order to meet the needs of gay and lesbian students, the public schools must, at the very least, provide an environment in which these students can feel physically and emotionally secure. As a first step toward this end, it is essential that school districts be able to prohibit discrimination on the basis of sexual orientation. In June 1992, respondent Boulder Valley School District RE-2 adopted a policy that prohibits discrimination on the basis of race, color, creed, marital status, national origin, gender, disability, or *sexual orientation*, together with a grievance procedure through which students may seek recourse for violations of the policy. Amendment 2 would prevent implementation of this policy, insofar as discrimination on the basis of sexual orientation is concerned. By the same token, other Colorado school districts that, like Boulder Valley School District RE-2, sought to create an environment that is conducive to learning for all students—including gay and lesbian students—would be prevented from doing so by Amendment 2.

The adoption of these policies is important not only because they provide a means of recourse for gay and lesbian students who are subjected to discrimination. Perhaps more important is the signal such policies send—that gay and lesbian students have a place in society, and that harassment, violence, and other forms of discrimination will not be permitted. As this Court has noted, it is the "work of the schools" to make clear to their students that language and conduct "highly offensive or highly threatening to others" is disfavored, for "the essential

lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct . . . ." *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986).

Another pernicious effect of Amendment 2 is to chill the efforts of public schools to meet the needs of gay and lesbian students, which we discussed in Part I, *supra.* The importance of such efforts was highlighted recently by the report of the Massachusetts Governor's Commission on Gay and Lesbian Youth. Appointed by Governor William Weld as a result of concern over the high suicide rate among gay and lesbian adolescents and the other serious problems facing these young people, the Commission urged school districts to: establish policies protecting gay and lesbian students from harassment, violence, and discrimination; train teachers and counselors in suicide and violence intervention; establish support groups for gay and lesbian as well as "straight" students; include in school libraries information for gay and lesbian students; integrate discussion of gay and lesbian issues into the curriculum; and provide counseling for the families of gay and lesbian students. *Making Schools Safe, supra,* at 2.[13]

School districts in various parts of the country, and education-related organizations such as *amici,* have established programs that attempt to address the needs of gay and lesbian students. As the Massachusetts Governor's Commission found, such programs are essential: "Adults who work in Massachusetts schools are ill-equipped to meet the needs of lesbian and gay students. Either intimidated or ignorant, school staffs often fail to provide these young people with the support and even with the protection they need." *Id.* at 20; *see also* Remafedi, *The Impact of Training on School Professionals' Knowledge, Beliefs,*

[13] The Commission's report resulted in the enactment, in December 1993, of an "Act to Prohibit Discrimination Against Students in Public Schools on the Basis of Sexual Orientation." *See* Mass. Gen. L. ch. 76, § 5.

and Behaviors Regarding HIV/AIDS and Adolescent Homosexuality, 63 J. School Health 153 (1993). By way of example, *amicus* NEA conducts inservice training programs on "Affording Equal Opportunity to Gay and Lesbian Students Through Teaching and Counseling." These programs are designed to sensitize teachers to the needs of gay and lesbian students and to enhance teachers' ability to meet those needs. While programs of this type by NEA and other private entities would not *per se* be prohibited by Amendment 2, the Amendment might prevent school districts from funding teacher participation in these programs, and from themselves providing such in-service training. Moreover, NEA policy urges school districts to "provide counseling by trained personnel for students who are struggling with their sexual/gender orientation." NEA Handbook 1992-1993, at 263 (Resolution C-26). Such efforts by school districts to meet the needs of gay and lesbian students and to insure these students equal opportunity within the public education system would be contrary to the spirit, if not the letter, of Amendment 2.

As was discussed above, one of the reasons for despair among adolescents newly discovering their homosexual identity is the perception that they are now part of a despised minority, and have no prospect of success and happiness in their personal or professional lives. A powerful antidote to such despair can come from gay and lesbian teachers, who by their very presence can give hope to the confused adolescent—and who can provide understanding and knowledgeable counselors to whom these students can turn. *See generally One Teacher in 10: Gay and Lesbian Educators Tell Their Stories* (K. Jennings ed. 1994). Not only do such teachers serve as important role models for gay and lesbian students, but they also help other students develop a more tolerant attitude toward their gay and lesbian classmates. As the Massachusetts Governor's Commission noted, "the key factor in

reducing fear and intolerance of gays and lesbians is a positive personal experience with an openly gay or lesbian person." *Making Schools Safe, supra,* at 20 (citing Herek, *Beyond "Homophobia": A Social Psychological Perspective on Attitudes Toward Lesbians and Gay Men,* 10 J. Homosexuality 1, 8 (1984)). But when gay or lesbian teachers reveal their sexual orientation they may—in the absence of a policy outlawing employment discrimination on the basis of sexual orientation—make themselves vulnerable to dismissal.[14]

A case in point is *Gaylord v. Tacoma School Dist. No. 10,* 559 P.2d 1340 (Wash.), *cert. denied,* 434 U.S. 879 (1977), in which a Washington state high school teacher—who had counseled a student troubled about

[14] Some anti-gay and lesbian spokespersons object to the presence in the classroom of gay and lesbian teachers because they contend that it leads to the "recruitment" of students to homosexuality. This contention wholly ignores the overwhelming evidence that sexual orientation is established by a very early age and is thereafter highly resistant to change. *See* Burr, *supra*; Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research, 1 Law & Sexuality* 133, 148-52 (1991); Dennis & Harlow, *supra,* at 465; Green, *supra,* at 555-69; Stoller & Herdt, *Theories of Origins of Male Homosexuality: A Cross-Cultural Look,* 42 Arch. Gen. Psychiatry 399 (1985). Furthermore, research has failed to find any evidence that children of gay or lesbian parents—the type of role model most likely to be influential—are less well adjusted or any different in their development of gender identity and sexual orientation than children of heterosexual parents. Herek, *Myths About Sexual Orientation, supra,* at 157-61.

A second argument against the presence of gays in the classroom is that they are more likely than heterosexual men to molest children. This argument also is without foundation in fact. *See id.* at 152-56. It appears to rest in large part on the inaccurate assumption that males who molest male children are homosexual with respect to their adult sexual orientation. Many child molesters never have developed the capacity for mature sexual relations with other adults, either men or women; and those who have are no more likely to have a homosexual than a heterosexual orientation. *Id.* at 153-55; Groth & Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons,* 7 Arch. Sexual Behav. 175, 176-77 (1978).

his own sexual identity—was dismissed when the teacher's homosexuality became publicly known. The discharge, which was upheld by the Washington Supreme Court, was based on the expansive charge of "immorality"—which constitutes a ground for dismissal under the teacher tenure laws of many states. *See, e.g.,* Colo. Rev. Stat. § 22-63-301. Quite apart from the question of employment discrimination, such discharges of openly gay and lesbian teachers reinforce the stigma felt by gay and lesbian students. Dennis & Harlow, *supra,* at 473.

Even prior to Amendment 2, and after respondent City of Denver had enacted an ordinance barring employment discrimination based on sexual orientation, gay and lesbian teachers in the Denver School District were reported to be insecure about the extent to which they could, without fear of reprisal, counsel gay and lesbian students. Stevens, *Help Is Scant for Gay Students: Area High Schools Offer Little Counsel,* Denver Post, Dec. 2, 1990, at 1A. Without the protection of policies that prohibit employment discrimination on the basis of sexual orientation—which are precluded by Amendment 2—it is even less likely that gay and lesbian teachers will take the risk of counseling those of their students who badly need such support.

B. Not only does Amendment 2 undermine the ability of the public schools to meet the needs of gay and lesbian students, but it impacts more broadly on the educational mission of the public schools. In raising discrimination against those perceived as different to the level of high constitutional principle, Amendment 2 calls into question one of the most important values the public schools attempt to teach their students—tolerance and respect for those who are different. As one observer has noted, homophobia is "similar in nature and dynamic to all other prejudices including anti-Semitism, racism, and sexism." Martin, *supra,* at 52; *see also* Bierly, *Prejudice Toward Contemporary Outgroups as a Generalized Attitude,* 15 J. Applied Social Psychology 189 (1985). If

invidious discrimination on the basis of fears and prejudices about homosexuality is deemed to be reasonable, acceptable, and legal behavior, then it is difficult to see how the schools can discourage their students from similarly giving effect to equally irrational fears and prejudices about those who differ by race, religion, or ethnicity.

Through Amendment 2 the State officially sanctions discrimination against certain of its citizens, just as surely as did the anti-Semitic laws of Nazi Germany or the Jim Crow legislation of an earlier period in this country. It is illusory to believe that a state-created norm of intolerance, once called into existence, can be limited to its avowed object. "Prejudice, once let loose, is not easily cabined." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring).

Amici believe that the public schools are the agency of society that is most responsible for bringing about appreciation for diversity and respect for the rights and dignity of all. Yet it is plain that the schools will not be able to persuade students of these fundamental values if the State asserts as a matter of constitutional principle that invidious discrimination against one particular minority group is acceptable. It is this that may be the most tragic legacy of Amendment 2, should it be permitted to stand.

CONCLUSION

The judgment of the Supreme Court of Colorado enjoining the implementation of Amendment 2 as contrary to the Constitution of the United States should be affirmed.

Respectfully submitted,

ROBERT H. CHANIN
(Counsel of Record)
JOHN M. WEST
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340
Counsel for Amici Curiae